(32,638)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 226

ROSARIO GAMBINO AND JOSEPH LIMA, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fols. a & 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

No. —

UNITED STATES OF AMERICA, Complainant,

against

ROSARIO GAMBINO and JOSEPH LIMA, Defendants

PETITION FOR WRIT OF ERROR, SUPERSEDEAS, AND BAIL

To the Honorable Frank Cooper, Judge of the District Court of the United States for the Northern District of New York:

And now come Rosario Gambino and Joseph Lima, the Defendants in the above entitled cause, and feeling themselves aggrieved by the verdict of the jury and the judgment of the District Court of the United States, for the Northern District of New York, entered on the 27th day of May, 1925, hereby petition for an Order allowing them, said Defendants, to prosecute a Writ of Error from the United States Circuit Court of Appeals of the Second Circuit to the District Court of the United States, for the Northern Dis-[fol. 2] trict of New York; that said Writ of Error may be made a Supersedeas, and that your Petitioners be released on bail in an amount to be fixed by the Judge thereof, pending the final disposition of said Writ of Error. Assignment of Errors is filed with this petition.

Dated May 27th, 1925.

Rosario Gambino, Joseph Lima, by I. K. Baxter, Their Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

And now, on this 15th day of August, 1925, come the Defendants, Rosario Gambino and Joseph Lima, by their At-

torney, I. K. Baxter, and say that the Judgment of conviction entered against them in the above case on the 27th day of May, 1925, is erroneous and unjust to the defendants, because—

[fol. 3] First

The Court erred in denying the preliminary motions of the Defendants to restrain the use of evidence obtained through the false arrest and the illegal search and seizure of Defendants and their property, by New York State Policemen J. T. Carroll and R. M. Travis, on the first day of August, 1924; and for the return to the defendants of the property seized from them as aforesaid; because said arrest, search and seizure were made without any warrant or authority in law, and in violation of their Constitutional rights to be immune from unreasonable searches and seizures to not be compelled to give evidence against themselves and to not be deprived of their liberty or property without due process of law.

Second

The Court erred in admitting over objections and exceptions of Defendants, at the time of the trial, evidence of said State Policemen J. T. Carroll and R. M. Travis, on May 15, 18 and 25, 1925; because said evidence had been obtained by means of the false arrest of and the unlawful search and seizure of Defendants and their property, in violation of their constitutional rights, as aforesaid.

Third

The Court erred in admitting over objections and exceptions of defendants at the time of trial, evidence by J. T. Carroll, that "the rear end of Defendants' automobile hung [fol. 4] pretty low;" and in response to the question: "What did that indicate to your mind?" the answer: "There was a load of *booze*;" because the question called for a mental operation or conclusion of the witness, and the answer given was merely such opinion or conclusion, not a fact within his knowledge and the witness was not shown qualified to answer.

Fourth

The Court erred in admitting over objections and exceptions of defendants, at the time of the trial, evidence by J. T. Carroll, that Mr. Frank Rayno "has a reputation of being a big bootlegger;" because the reputation of Frank Rayno, a stranger, was incompetent, irrelevant and immaterial to the issues in the case, and the evidence was improperly suggestive and prejudicial as against the Defendants to the Jury.

Fifth

The Court erred in admitting over objections and exceptions of defendants, at the time of the trial, testimony by Trooper Carroll that: "After finding beer in the car, or what we took to be the beer in the car, at that time I went downstairs and asked what they had on, and I went in the direction of Lima and he said 'I have a gun.' He took a .25 Colt automatic out of his vest pocket and gave it to me;" because the answer was not responsive to the question asked, viz: "What conversation, if any, did you have with either of these defendants at the police station there on [fol. 5] that occasion?" Said answer contained statements of opinion or conclusion by the witness, without foundation, which were incompetent as evidence, and highly prejudicial and improper for the Jury to receive as evidence.

Sixth

The Court erred in admitting over objections and exceptions of defendants, at the time of trial, testimony by Carroll and Travis that they had seized a revolver, a pistol and cartridges from the defendants, and in admitting such property in evidence; because it had been shown that said property was lawfully in possession of the defendants under proper permits of a Court of Record; and because such evidence was irrelevant, incompetent and immaterial, improperly suggestive and highly prejudicial to the jury, as against the defendants.

Seventh

The Court erred in admitting in evidence over objections and exceptions of the defendants at the time of trial cer-

tain bottles and labels and alleged beer as Government Exhibits Nos. 5, 6 and 7, because the same were irrelevant, incompetent and immaterial, were not properly proven, were improperly suggestive to the jury and prejudicial to defendants.

Eighth

The Court erred in admitting over objections and ex- [fol. 6] ceptions of the defendants, at the time of trial, evidence by Government Chemist Rubin as to the alcoholic contents of Government Exhibits Nos. 5, 6 and 7, because the same were irrelevant, incompetent and immaterial, no proper foundation for such evidence having been laid.

Ninth

The Court erred in sustaining Government's objection to the following question on Cross-examination of State Policeman Carroll: "At the time you told these Gentlemen of the Jury that you had in good faith stated all you remembered finding, you knew at that time that you found also and had delivered to you in your possession valid permits from a Court of Record, authorizing these men to carry revolvers, is not that true"? because Counsel for Defense showed the Court by the record that the witness had previously testified that he had in good faith stated all he remembered finding and had not stated that he found said permits, although later he admitted receiving said permits from defendants. The question bore directly on the good faith and credibility of the witness and was asked upon Cross-examination.

Tenth

The Court erred in refusing to permit Defendants on Cross-examination to question witness Carroll as to the contents of an affidavit made by witness in the case at bar on the 14th day of May, 1925, and in refusing the offer of said affidavit in evidence for the purpose of contradicting [fol. 7] other testimony by witness and as bearing upon the credibility of the witness; because it was a proper subject for Cross-examination, the said affidavit having been presented to the Court by the prosecution on the preliminary motions.

Eleventh

The Court erred in admitting over objections and exceptions of defendants, at the time of the trial, evidence by witness Steenbaerge that Government Exhibits Nos. 5 and 6 were kept by witness from the time they were turned over to him by Mr. Robillard, until he took the contents from one of the bottles and put it into another bottle and sent it to the chemist for analysis; because said testimony was given in response to leading questions in the following form, viz:

"Q. After Exhibit No. 5, Government's Exhibit No. 5, for identification and Government's Exhibit No. 6 for identification, were turned over to you by Mr. Robillard, did you keep them in your possession?"

A. "I did."

Q. "Until you took the contents from one of the bottles and put it into the other bottle you sent to the Chemist for analysis?"

A. "I did, yes, sir";

and said questions were improper in form, called for a conclusion and were leading.

Twelfth

The Court erred in admitting over objections and exceptions of Defendants, at the time of the trial, evidence by Witness Steenbaerge, that Government Exhibits Nos. [fol. 8] 5 and 6 were in the same condition at the time that they were turned over to the Government Chemist as at the time witness had received them; because said evidence was given in response to a leading question in the following form:

Q. "And it was in the same condition until the cap was taken off the bottle, and some of the contents poured into Government's Exhibit No. 7?"

A. "It was."

Because the question was leading, called for a conclusion or opinion of the witness, no foundation laid for same, and witness not shown qualified to answer.

Thirteenth

The Court erred in admitting over objections and exceptions of Defendants, at the time of the trial evidence by Witness Steenbaerge, that Government's Exhibit No. 6 was in the same condition when he turned it over to the chemist on May 18th, 1925, as it was when he received it from Mr. Robillard on August 2nd, 1924; because of said evidence was an opinion or conclusion on the part of the witness, without foundation, and was given in response to a leading question in the following form:

Q. "Well, whether or not it was in the same condition when you turned it over to Mr. Rubin, the chemist, last Tuesday, as you have stated, as it was when you received it from Mr. Robillard on August 2nd, 1924, as you have heretofore testified, with the exception of the typewritten label, which appears on the exhibit?"

A. "It is";

and because witness admitted on cross-examination that he did not know anything about the contents of the bottle.

[fol. 9] Fourteenth

The Court erred in denying the motion of the Defendants after all the evidence in the case was in, to direct a verdict of not guilty on count one of the Indictment, conspiracy, as to each of the Defendants upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said Defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their Constitutional rights, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; to which ruling of the Court the defendants by their counsel duly excepted.

Fifteenth

The Court erred in denying the motion of the Defendants, after all the evidence in the case was in, to direct a verdict of not guilty on Count three of the Indictment, possession, as to each of the Defendants upon the grounds that there

was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their constitutional rights as guaranteed by the Fourth, Fifth Amendments to the Constitu-[fol. 10] tion of the United States; and that the law under which this count was found was unconstitutional, because neither the Eighteenth Amendment nor any other part of the Constitution of the United States authorized to Congress nor delegated to the United States the power to pass such a law, nor did the constitution prohibit to the States the power to pass such a law; therefore such power is reserved under the Tenth Amendment to the Constitution of the United States to the States respectively, or to the People; to which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

Sixteenth

The Court erred in denying the motion of the Defendants after all the evidence in the case was in, to direct a verdict of not guilty on Count four of the Indictment, transportation, as to each of the defendants, upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their Constitutional rights as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; to which ruling of the Court, the Defendants, by their counsel, duly excepted.

Seventeenth

The Court erred in not directing the jury to find the De-[fol. 11] fendants not guilty at the close of the whole case.

Eighteenth

The Court erred in charging the jury as follows: "If you are satisfied beyond a reasonable doubt that there was

an agreement and that these men were there by this agreement and that they were doing something in carrying out that agreement, why, then, you may find them guilty of conspiracy." To which charge of the Court the Defendants, by their counsel, duly excepted.

Nineteenth

The Court ered in charging the Jury as follows: "If that be so, then, as far as the Defendant Lima is concerned, he is not guilty of conspiracy, he is not guilty of any other offense, if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made."

To which charge of the Court, the Defendants, by their counsel, duly excepted.

Twentieth

The Court erred in charging the Jury as follows: "So, if you are satisfied beyond a reasonable doubt that there were intoxicating liquors in that car and Gambino and Lima knew they were in the car, then they are guilty of possession. If only one knew it why, then that one who knew [fol. 12] it is guilty of possession. If neither of them knew it and the- were both innocent of any knowledge of the contents of the car, then neither of them is guilty." To which charge of the Court, the Defendants, by their counsel, duly excepted.

Twenty-first

The Court erred in charging the Jury as follows: "If the Jury are satisfied by evidence which convinces them beyond a reasonable doubt that these two defendants or either of them had in their possession intoxicating liquor, and knew that it was intoxicating liquor, that warrants a verdict of guilty." To which charge of the Court, the Defendants, by their counsel, duly excepted.

Twenty-second

The Court erred in denying the Defendants' motion to set aside the verdict of the Jury on the ground that it was not

supported by any competent evidence in the record. To which charge of the Court, the Defendants, by their counsel, duly excepted.

Twenty-third

The Judgment of the Court is contrary to law, as shown in the foregoing Assignment of Errors.

Wherefore, said Defendants and plaintiffs in error pray that the said Judgment of the District Court of the United States may be reversed and held for naught; and that the [fol. 13] property illegally seized from the Defendants may be ordered returned to them.

I. K. Baxter, Attorney for Petitioners.

In United States District Court

[Title omitted]

Order Allowing Writ of Error and Bail.—May 27, 1925

Let a Writ of Error issue from the United States Circuit Court of Appeals for the Second Circuit to the United [fol. 14] States District Court for the Northern District of New York, as prayed for in the petition of the said Rosario Gambino and Joseph Lima; and that a citation be issued to the Defendants in error.

And, it now appearing that a citation has been served in the cause, it is now ordered That the Writ of Error, allowed us above stated, operate as a Supersedeas, and the Defendants be admitted to bail, upon furnishing a bond in the penal sum of Five Thousand Dollars each conditioned according to law to be approved by me.

Frank Cooper, Judge.

[fol. 15] Citation, in usual form, omitted in printing.

[fol. 16] In United States Circuit Court of Appeals, Second Circuit

No. —

Rosario Gambino and Joseph Lima, Plaintiffs-in-error,

against

United States of America, Defendants-in-error

Notice of Filing of Precipe

To the Hon. Oliver D. Burden, attorney for defendants-in-error:

Sir: Please take notice that on the 18th day of August, 1925, the undersigned filed with the clerk of this Court a præcipe for the record to be transmitted to the United States Circuit Court of Appeals, Second Circuit, on the Writ of Error used out in the above cause, and notice of which præcipe is herewith served on you.

Irving K. Baxter, Attorney for Plaintiff-in-error.

Office and P. O. Address: 66 Genesee Street, Utica, New York.

[fol. 17] In United States District Court

Writ of Error

The President of the United States to the Honorable Judge of the District Court of the United States for the Northern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment, of a cause which is in the said District Court before you between the United States of America, Plaintiff, and Rosario Gambino and Joseph Lima, Defendants, manifest error has happened to the great damage of the said Defendants, Rosario Gambino and Joseph Lima, as by their complaint appears, we, being willing that error, if any, should be duly corrected, and full, speedy justice — to the parties aforesaid in their behalf, do command, if judgment be given thereunder, that then under

your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this Writ, so that you have the same in the Postoffice Building, in the Borough of Manhattan, in the City of New York, in said Circuit, on the 17th day of September, 1925, in the said Circuit Court of [fol. 18] Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done thereunder to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 20th day of August, 1925, in the 149th year of the Independence of the United States of America.

R. A. Higgison, Clerk, by Nellie J. Marks, Deputy.

In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Notice of Presentation of Bill of Exceptions

Sir: You will please take notice that the annexed Bill of Exceptions herein will be presented to the Honorable [fol. 19] Frank Cooper, United States District Court Judge, in and for the Northern District of New York, at his chambers in the Federal Post Office Building, at Albany, N. Y., on the 26th day of February, 1925, at 10 o'clock in the forenoon of that day, or — soon thereafter as counsel can be heard, for settlement and allowance as a part of the record in the above entitled cause, upon the Writ of Error sued out herein by the Plaintiffs-in-Error.

Dated February 26th, 1925.

Irving K. Baxter, Attorney for Plaintiffs-in-error.

Office and P. O. Address: 60 Genesee St., Utica, N. Y.

IN UNITED STATES DISTRICT COURT

INDICTMENT

The Grand Jurors of the United States of America, duly empanelled, sworn and charged to inquire in and for [fol. 20] the said Northern District of New York, upon their oaths and affirmations, do indict and present that Rosario Gambino and Joseph Lima, hereinafter called Defendants, in the months of July and August, 1924, in the County of St. Lawrence, State and Northern District of New York, and within the jurisdiction of this Court, wilfully, wrongfully and feloniously conspired, confederated and agreed together and with others, whose names are to your Grand Jurors unknown, that they would commit an offense against the United States by wilfully and unlawfully violating the National Prohibition Act and the Customs Laws of the United States by wilfully and unlawfully importing and bringing into the United States and transporting through the State and Northern District of New York, after such importation, large quantities of intoxicating liquors, which were forbidden to be brought into the United States, possessed or transported therein, such liquors being fit for beverage purposes and containing more than one-half of one per cent of alcohol.

That after the formation of such conspiracy and in furtherance thereof the Overt Acts for the purpose of effecting the object of such conspiracy and during the continuance thereof, were as follows:

That the said Defendants, in a Buick Roadster, belonging to Defendant Gambino, went to Canada across the International Boundary Line, and obtained a load of Canadian Ale, same being intoxicating liquor, containing more [fol. 21] than one-half of one percent of alcohol by volume and fit for beverages purposes, and imported said ale across the International Boundary Line into the States and Northern District of New York and within the jurisdiction of this Court, or obtained same at a place near the International Boundary Line in the District and State aforesaid, and transported same South to Massena, where they were apprehended, such importation, possession and transportation through the State and Northern District of New York, of such intoxicating beverages forbidden to be brought

into the United States, possessed and transported therein, being in violation of the National Prohibition Act and all of the aforesaid being in violation of the provisions of Section 37 of the Criminal Code of the United States and against the peace and dignity of the United States of America.

Count Two

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that Rosario Gambino and Joseph Lima, hereinafter called defendants, in the months of July and August, 1924, in the County of St. Lawrence, State and Northern District of New York, and within the jurisdiction of this court, wrongfully, fraudulently and unlawfully imported and brought into the United States from the Dominion of Canada certain large quantities of intoxicating liquors fit for beverage purposes, containing more than one-half of one per [fol. 22] cent of alcohol by volume, contrary to the form of the Statute in such case made and provided and particularly Section 3, Title 2, of the National Prohibition Act and against the peace and dignity of the United States of America.

Count Three

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that in the month of July and August, 1924, in the County of St. Lawrence, State and Northern District of New York and within the jurisdiction of this Court, Rosario Gambino and Joseph Lima, hereinafter called defendants, wrongfully, fraudulently and unlawfully possessed certain large quantities of intoxicating liquor, fit for beverage purposes, containing more than one half of one per cent of alcohol by volume, contrary to the form of the statute in such case made and provided and particularly Section 3, Title 2, of the National Prohibition Act, and against the peace and dignity of the United States of America.

Count Four

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that

in the months of July and August, 1924, in the County of St. Lawrence, State and Northern District of New York and within the jurisdiction of this Court Rosario Gambino and Joseph Lima, hereinafter called defendants, wrong-[fol. 23] fully, fraudulently and unlawfully transported certain large quantities of intoxicating liquors, fit for beverage purposes, containing more than one-half of one per cent of alcohol by volume, contrary to the form of the statute in such case made and provided and particularly Section 3, Title 2, of the National Prohibition Act, and against the peace and dignity of the United States of America.

R. Dey, Foreman of the Grand Jury. Oliver D. Burden, U. S. Attorney in and for the Northern District of New York.

In United States District Court

[Title omitted]

Bill of Exceptions and Order Settling Same

Be it remembered that the preliminary motions of the defendants in the above entitled cause came on for hearing and decision on the 27th day of October, 1924, being one of the days of the October term of said court, before the Hon-[fol. 24] orable Frank Cooper, one of the Judges of said court.

Leo Breed, Esq., appeared as counsel for the Government.

S. J. Capeceiatro, Esq., appeared as counsel for the defendants.

Defendants moved to restrain the use of evidence unlawfully obtained by J. T. Carroll and R. M. Travis, New York State policemen, through the alleged false arrests of the defendants and the alleged illegal search and seizure of defendants' property on the 1st day of August, 1924, near Massena, N. Y., and for an order directing the return to the defendants of the property unlawfully seized from them, as aforesaid; and offered in support of said motions, the verified petition of the defendants alleging that on the 1st

day of August, 1924, while petitioners were lawfully upon the State highway at or near Massena, N. Y., in defendant Gambino's Buick roadster, they were falsely arrested by State Troopers Carroll and Travis, and their property and persons searched and seized, without any warrant or authority in law, and in violation of their constitutional rights to be secure from unreasonable searches and seizures, and to not be deprived of their property or liberty without due process of law, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. That the seized property and persons of the defendants were turned over by the said State officers to Federal of- [fol. 25] ficials for prosecution in the United States District Court for alleged illegal possession and transportation of intoxicating liquor, to wit: beer. That said Federal officers were proposing to use evidence obtained by means of the said false arrest and illegal search and seizure by said State troopers against these defendants, at their proposed trial in said United States District Court on said charges and in proceedings to have defendants' said property confiscated. That defendants also presented in support of the motion, at said time, affidavits by N. E. Santamour and George Aubrey, wherein it was shown that the defendants stopped in front of the Reno Garage, of which Santamour was the proprietor, and said Aubrey was an employee, on the first day of August, 1924. That defendants, at about one o'clock in the afternoon of said day, stopped in front of said garage in their Buick automobile. That immediately thereafter, State Troopers Carroll and Travis also stopped in front of said garage in a Ford car and demanded of defendants to open the rear compartment of their car. That defendants refused to do so, whereupon said State troopers asked said Santamour for keys to open said rear compartment. That said Santamour informed said State troopers that they did not have any keys which could open said compartment. That said State troopers then questioned defendants as to what was in the rear compartment of their car. That both defendants informed the State troopers that they did not know what was in said compartment. That thereupon and without further ado, said State troopers arrested the defend- [fol. 26] ants and ordered them to proceed in their custody

to Massena, New York. That said Santamour and Aubrey made an outward examination of said Buick car, and that no liquor or intoxicating beverage of any kind and no merchandise, freight or packages whatsoever appeared to be in said car, and that said Santamour asked said State troopers whether they had a search warrant and was informed that they did not have any.

The cause came on for trial on the 15th day of May, 1925, being one of the days of the May term of said court, before Honorable Frank Cooper, one of the Judges of said court.

Leo Breed, Esq., appeared as counsel for the Government.

Irving K. Baxter, Esq., appeared as counsel for the defendants.

The defendants again moved to restrain the use of evidence unlawfully obtained as aforesaid, and for the return of property unlawfully seized, as aforesaid, upon all the grounds and upon all the papers theretofore offered in support of said motions. A copy of an answering affidavit of J. T. Carroll was then served upon counsel for the defendants, by Leo Breed, Esq., and the court filed a written order denying said motion. That counsel for defendants then and there duly objected to the presentation and filing of said answering affidavit, as aforesaid, on the ground that the motions had come on for hearing and determina-
[fol. 27] tion by the court and had been determined by the court on the 27th day of October, 1924, at which time the court had made its decision, and that said affidavit was accordingly presented too late to be considered by the court on any of the motions and upon the further ground that the defendants had been noticed for trial and were to be tried immediately on that day, without any opportunity of investigating or answering whatever allegations might be contained in said answering affidavit; and that the defendants had presented a proposed order to the court merely to complete the record of the presentation and decision of said motions by the court at a previous time, and that the presentation of said answering affidavit was therefore too late, inadmissible, incompetent at that time, and no proper part of the proceedings; but the court overruled said objections of the defendants, and ordered the defendants to be ready to proceed to trial; to which ruling of the court,

the defendants, by their counsel, then and there duly excepted.

That said answering affidavit alleged in substance that said affiant, J. T. Carroll, New York State Policeman, in company with Trooper Travis, were traveling on the highway from Massena, N. Y., to Hogansburg, N. Y., in an automobile on the first day of August, 1924. "That they met a Buick roadster, which was loaded very heavily. That Deponent noticed that the license plates were from a county in the *the* central part of the State. That these facts, together with the fact that the car was heavily loaded and [fol. 28] was traveling at a speed of about twenty-five or thirty-five miles per hour, and from his experience which he has had with the activities in transporting intoxicating liquors in the Northern part of the State, these facts lead him to believe that this was a load of intoxicating liquor. That Deponent and Trooper Travis turned around and apprehended the driver and occupant of said Buick Roadster. That said Buick roadster was being driven at that time by Rosario Gambino and the occupant was Joseph Lima. That these two were placed under arrest at this time. Deponent further says that at the time there were no Federal officers present, and that they were not working in conjunction with Federal Officers."

The Court then ordered a Jury drawn, and the case to proceed to trial.

The Government to maintain its case offered the following evidence, to wit:

By Joseph T. Carroll, New York State Policeman, that on August 1st, 1925, he and Trooper Travis were stationed for duty at Massena, N. Y. That at about 1 o'clock in the afternoon, he and Travis were traveling on the Massena-Hogansburg road, in a Ford car, and met the Defendants about three miles north of Massena, driving toward Massena in a Buick roadster. That they first observed the license plate was from the central part of the State, and that the "rear end hung pretty low" on Defendant's car. The witness was then asked by Mr. Breed: "What did that indicate to your mind?" To which question the Defendants, by their counsel, objected as calling for a conclusion,

[fol. 29] expert opinion, witness not shown qualified to answer, and should be confined in his testimony to what facts he observed and the Jury be allowed to form their own conclusions or opinions as to what was indicated by said facts. But the Court overruled the objection, to which ruling of the Court, the Defendants, by their counsel, duly excepted; and the witness then made answer: "There was a load of booze."

Witness then testified over an objection and exception of Defendants "I have been stationed up along the Northern border three years and eight months and have had considerable experience with cars transporting various liquors;" that "cars loaded or hanging that way have usually been loaded with booze coming from the border." That the two Troopers then turned their car around and followed Defendants' car to Rayno's garage, in the Village of Massena, in front of which the Defendants stopped. That witness Carroll then asked Defendant Gambino for his registration card, and that same was shown to him. That witness then asked Defendant what he had in his car and was told by Defendant to find out. That witness then asked for the key. That Defendant refused to give him the key. That witness then took his car and shook it and heard the bottles and asked how many cases he had on. That Defendant told him to find out. That Defendant Lima was meanwhile walking towards the garage. That Trooper Travis went and brought him back to the car. That Gambino got into the Ford car with witness and was driven to the police sta-[fol. 30] tion. That witness asked Defendant Lima where they got the ale. That Lima did not say they got the ale, but did say they came from Hogansburg. That witness had known Frank Rayno for about one year.

The witness was then asked: "Do you know what his reputation is up in that section with reference to bootlegging?" to which question Defendants objected as highly improper, suggestive and prejudicial. The Court then stated: "It has no bearing on any of the charges here." Mr. Breed then said: "But their stopping at this garage."

The Court: "Did he say the car stopped in front of Rayno's garage?"

Mr. Breed: "Yes, sir, and one of them got out and started to go in and the other one was in the act of getting out."

The Court then ruled: "It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the Jury will understand the objection is overruled." To which ruling of the Court the Defendants, by their counsel, then and there duly excepted. The witness then testified: "He has a reputation of being a big bootlegger," and that he ran this garage in Messena but not personally. These objectionable questions were then withdrawn and the answer stricken out at the request of the Government Counsel; and the witness was then asked: "Did you know at {fol. 31} that time on August 1st, 1924, what Mr. Rayno's reputation was for bootlegging up in that section?" to which question the Defendants, by their counsel, objected on the ground that it was leading, improperly suggestive to the Jury, but irrelevant, incompetent and immaterial and improper in form; but the Court overruled the objections, stating its reason for so doing as before, and the witness answered: "Yes, sir." Government Counsel then asked: "What was that reputation?" to which Defendants made the same objection, and the Court the same ruling; to which ruling an exception was taken by the Defendants. The witness then answered: "He had the reputation of being a bootlegger." That after leaving the garage the two Troopers and the Defendants drove to the police station at Messena, witness driving the Buick roadster with Lima riding with him, and Travis driving the Ford with Gambino riding beside him. That on arriving at the police station witness again asked for the key and was told to go ahead and find it; so he did and found it in the left hand side pocket of the car. That he opened the rear end of Defendant's car and found therein fourteen cases of Canadian ale with the bottles packed tightly neck to neck. On motion of Defendants, the Court ordered stricken out that part of the testimony in which the witness designated the

contents of the bottles as Canadian ale. That the witness did not taste or smell the contents of any of the bottles. That there were labels on the bottles, but was not allowed to describe the labels or testify to what was on them, be- [fol. 32] cause the Court sustained the objection of the Defendants that the labels themselves were the best evidence. That the witness then turned over the bottles and their contents and labels and everything that was on them, to Agent Robillard of the Border Patrol, in the same condition as they were when he took them out of the Buick car. That witness was then asked the following question:

By Mr. Breed:

Q. What conversation, if any, did you have with either of these Defendants at the police station there on that occasion?

A. After finding the beer in the car, or what we took to be the beer in the car at the time, I went downstairs and asked what they had on, and I went in the direction of Lima, and he said "I have a gun." He took a twenty-five Colt automatic out of his vest pocket and gave it to me.

Q. Lima did?

A. Yes, sir.

Q. Did you search him further?

A. We did.

Mr. Baxter: I object to that part of the answer in which he says, after such and such facts and suggests things that are not responsive to the question. The question called for the conversation and I move to strike out the gossip and that was relative to conversation.

The Court: What was the question?

(The stenographer repeated the question as follows: "Question: What conversation, if any, did you have with either of these Defendants at the police station there on the occasion? Answer: After finding the beer in the car, or what we took to be beer in the car, at that time, I went downstairs and asked what they had on, and I went in the direction of Lima and he said 'I have a gun.' He took a twenty-five Colt automatic out of his vest pocket and [fol. 33] gave it to me.")

The Court: It is true "he took it out of his pocket and gave it to me" is not responsive. If you want to object to it, he will have to put it in another question.

Mr. Baxter: Also preliminary remarks, after such and such things were taken from the car, designating it as beer.

The Court: It is harmless. We won't bother to strike that out.

Mr. Baxter: Exception.

The Court: Strike out if you want to that he took a twenty-five, whatever he said, about the revolver. You will have to put that in a separate question, if you want it.

Mr. Breed: Do you insist on your objection as not responsive, Mr. Baxter?

Mr. Baxter: I am endeavoring to defend two men, and I insist on anything.

Mr. Breed asked witness the following question: "At that time did you see anything on Lima with reference to a gun or anything like that? to which question the Defendants made objection that it was leading and improper in form; but the Court overruled the objection, to which ruling of the Court the defendants, by their counsel, then and there duly excepted. Witness then testified that he searched Defendant Lima and found a twenty-five Colt automatic in his pocket with a few shells fitting the same. That the other Defendant was there at the time, and when asked by witness if he had a gun, said he did and produced it from his hip pocket. That witness then searched said other Defendant Gambino and found his pockets just money and papers. That both guns were loaded at the time witness took them from Defendants. That Defend- {fol. 34} ants told witness they lived in Utica, N. Y. That he asked defendants where they got the load they had on, but that Defendants did not answer. That witness then checked up the license number of Defendants' car. That he thought he had now told the Court and Jury everything that happened on this occasion. That he then arraigned these Defendants before the United States Commissioner and Defendants waived examination and were held by the Commissioner.

The direct examination of Trooper Carroll was then suspended and Trooper Travis called as a witness, who testified that on August 1st, 1924, he was stationed at Massena, N. Y., with Sergeant Carroll, the former witness. He had been a trooper for 18 months stationed along the Canadian border. That in the early afternoon of said date, he was riding with Trooper Carroll in a Ford car on the Massena-Hogansburg road, and that Hogansburg was on the border line of Canada, and fourteen miles from Massena. That they met the Defendants about three miles out of Massena in a Buick roadster, and that the first thing he noticed was the "auto county license," The Defendants objected to the testimony and moved to strike it out as being an opinion or conclusion of the witness, rather than a fact. But the Court overruled the motion and defendants excepted. The Prosecuting Attorney then asked, "And from the data which you have you were able to determine that it was from out of the county?" to which question the Defendants objected as leading and improper in form; but the Court overruled the objection, defendants excepted and witness answered: "Yes, sir." That witness [fol. 35] did not know at that time from what county the car was licensed; that the car seemed to be heavily loaded, and the rear fender was riding close to the wheel, in the way that generally indicates a loaded car. The defendants moved to strike out this part of the testimony, but the Court overruled the Motion, and the Defendants excepted. That the Troopers then turned around and followed the Defendants' car.

The Court then recessed until noon, May 18th, 1925, at which time Trooper Carroll was recalled.

An automatic pistol was marked Government Exhibit No. 1 for identification; magazine marked No. 2 for identification, revolver marked No. 3 for identification; and cartridges marked No. 4 for identification.

"Exhibit 1 is the gun found on Lima, in his right hand vest pocket. Exhibit 2 was in the gun at that time and loaded. There was a cartridge in the chamber. Exhibit 3 Gambino had in his right hand hip pocket. The chamber was loaded. The Cartridges, Exhibit 4, are the same calibre and same kind of cartridges as Defendants had." Wit-

ness testified that Government's Exhibit No. 4 "are the same calibre and same kind of a cartridge" as those he took from Defendants on the occasion of their arrest.

Government's Exhibits Nos. 1, 2, 3 and 4 were then offered in evidence. Defendants objected to their receipt on the ground that they were irrelevant, incompetent and immaterial, had no bearing on any of the issues in the case and were improperly suggestive and prejudicial*y* to Defend-
[fol. 36] ants; but the Court ruled that "*that* these things are competent evidence upon one of the charges in the case, namely, the question of conspiracy"; and overruled Defendants objections, to which ruling of the Court, the Defendants, by their counsel, then and there duly excepted. The Court then ruled that only Exhibits Nos. 1, 2 and 3, were received in evidence at that time, and reserved decision as to Exhibit No. 4, to which ruling the Defendants also excepted.

Counsel for Government then asked to have a bottle marked Exhibit No. 5 for identification, and then asked witness if said Exhibit 5 was similar to the bottles taken from the Defendants on the occasion in question, with the exception of a square label with typewriting on it, and witness answered: "It is." Counsel for Defendants objected to the question and moved to strike out the answer on the ground that it was irrelevant, incompetent and immaterial, and an improper form of proof, the said offered exhibit not being shown to be in any wise connected with any of the issues in the case and not the best evidence.

Mr. Breed then stated: "I expect to connect this bottle up with the seizure. I merely wanted to ask him this one question, and if it is not connected up, I will consent that it be stricken out."

The Court: "On that statement of Counsel, objection overruled."

To which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

Witness then testified that he turned the whole load and the guns and the car over to Mr. Robillard.

On cross-examination, witness testified that on the day in question, he and Trooper Travis were traveling northerly
[fol. 37] from Massena in a Ford car at about twenty miles

per hour. Witness was driving the car, and on meeting the Defendants' car, which was traveling from twenty-five to thirty-five miles per hour, in the opposite direction, he looked and saw the two Defendants in that car. That he also "noticed the numbers, as there was an Oneida county license on it," and the rear end of the car and its loaded condition, although the two cars were passing each other at a relative speed of forty-five miles per hour, or greater. That said Troopers then turned around and followed Defendants' car, to in front of Frank Rayno's garage. That Defendant Gambino then invited witness to find out what was in the car. Counsel for Defendants then questioned witness with respect to his knowledge of his rights and duties in searching car on such occasions, but counsel for the Prosecution objected to such questions, and the Court sustained the objections; to which rulings of the Court, the Defendants by their counsel then and there duly excepted. Witness then testified that after shaking Defendant's car he arrested the two Defendants and told them he was going to take them over to the station, while he looked over their car.

Q. And did they make any objection to your taking them over to the station?

A. No, sir.

Q. You told that to these two Defendants together, or did you make a separate statement to each of them?

A. They were both within hearing at the time.

Q. Did you give them any further directions as to how you were going to take them over?

A. Yes, sir.

[fol. 38] Q. What were those?

A. I told Lima to get into the car, that is, the Buick roadster, and Gambino to get into the Ford.

Q. Did either of these Defendants make any reply to that order by you?

A. Lima said he would not drive the car.

Q. Is that all he said?

A. That is all I recall; yes, sir.

Q. Did Gambino make any statement at that time?

A. He wanted to know if he could not fix it up.

Q. How do you know he wanted to know that?

A. I beg your pardon?

Q. How do you know that Gambino wanted to know if he couldn't fix it up?

A. That is what he asked me.

Q. He stated to you there something on that subject, did he?

A. Yes, sir, he did.

Q. What was it?

A. He asked me if he couldn't fix it up.

Q. And how many people were present at that time?

A. Why, there was Lima and my partner somewhere in the vicinity.

Q. And weren't there some other people standing about?

A. Not near the car; no, sir.

Q. And that was just before he got into the car?

A. Just a short time before that; yes, sir.

Q. And what reply did you make to him?

A. I told him "No, of course not."

Q. Is that all the conversation that took place before they got in the car?

A. That is all I recall.

Q. You did not tell them why you were arresting them, beyond what you have already said?

A. No, sir, I don't think, I did.

Q. Well, you know whether you did; don't you?

A. Why, no, that is some time ago.

Q. Now, when you came to the back end of this car and shook it, as you said, will you tell us in detail just what you did and heard?

A. Why, I kind of lifted the back end of the car and let [fol. 39] it drop and you could hear the bottles clink.

Q. Very loud?

A. Why, not so awful loud; loud enough to hear.

Q. Well, did anyone else hear it besides you?

A. Anyone could, if they had been within hearing; yes, sir.

Q. Was there anybody else within hearing?

A. I don't know.

Q. Well, you were there; weren't you?

A. Yes, sir.

Q. You could see who was around there?

A. Yes, sir.

Q. And you know how loud those bottles clinked?

A. Loud enough to hear it, yes, sir.

Q. Was there anyone else in that vicinity close enough to hear them clink?

A. I don't recall whether there was or not.

Q. You didn't say anything to anyone that you had heard bottles clink at that time, did you?

A. Yes, sir.

Q. To whom did you say that?

A. My partner and also the two Defendants.

Q. You said it to the two who?

A. Gambino and, if I am not mistaken, Lima also.

Q. Was there anybody else present when you made that statement?

A. My partner was there; yes, sir.

Q. And then you got in the car and went away?

A. Yes, sir.

Q. And the only ones that were there were your partner and yourself and these two Defendants during all that time, is that so?

A. No, sir. There were other people standing around, but I don't know whether they were close enough to hear the conversation carried on or not.

That after being told by Defendant Gambino "to find out" what was in the car, he then immediately kind of lifted the rear end of Defendant's car and let it drop, and heard bottles clink. That he asked for the key before and after but that he did not recall asking Defendant for a key to open the rear end of the car in the meantime. That [fol. 40] he had not so testified on his direct examination. The following part of his direct testimony was then read to him: "I asked for the key. He refused to give me the key, so I took his car and shook it, and I heard the bottles, and I asked how many cases he had on." Witness then recalled so testifying and testified that his refusal to give him the key did not seem at all consistent with their telling him to go ahead and find out, so that when he shook the car, he was not exactly doing it with their permission; that he took it they did not care whether he shook it or not, and yet weren't going to help him. That he thought they did not want him to shake the car. That perhaps, he did, after Defendants refused to give him the key, go

to the garage and ask the men there if they had a key with which he could open that car; but that he didn't know whether he did or not. That when they arrived at the police station, he searched the persons of Defendants, and had told in good faith, on his Direct Examination, all that had been seized from them; that he did not say anything about seizing permits from a Court of Record, licensing the Defendants to carry the firearms seized from them because that had not been asked.

Witness was then asked: "And at the time, you told these Gentlemen of the Jury that you have in good faith stated all you remembered finding, you knew at that time that you found also and had delivered over to you, in your possession, valid permits from a Court of Record authorizing these men to carry those revolvers, is that not true?

Counsel for the prosecution objected to the question on [fol. 41] the ground that it was argumentative, and stated facts not in evidence, and stated to the Court that the witness had not been asked, upon direct examination, to tell all that was found upon the persons of the Defendants. Defendants' counsel called attention that the witness had been asked and had answered that question on Cross-Examination and had so qualified himself for this question. But the Court sustained the objection, to which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

Witness then testified that at the time he opened the rear compartment of Defendant's car at the police station, he noticed that the bottles were packed in well with excelsior or something like that, so that they would not break against one another, but not packed in tightly, and not loosely, but loose enough to rattle. That he took some of the bottles out of the rear compartment and saw some others taken out, but did not see them all taken out, and saw an attempt made to put them back in, but that all of the bottles would not go back in, because they were not packed the same way, and some of them were put in the front seat of the car. That he did not drink or taste any of the contents of the bottles and did not see any drank while he was there

That the car was then taken "behind the police station, until turned over to the agents of the Border Patrol."

Witness was then asked: "Is that all that was done with it?" to which question the United States Attorney objected on the ground that it was immaterial. The Court then [fol. 42] ruled: "Objection sustained, unless you contend it was delivered to some other person in the interim. If you contend that, you may ask him that question exactly." "The disposition of the car after the seizure is of no or little materiality in this case. It has no bearing on whether or not they committed the crimes charged. What difference does it make what was done with the car?" to which Counsel for Defendants replied: "We have not yet, if the Court please, had any testimony as to the contents of those bottles. Now, if I can show that they took this car out and took a joy ride around, and some time later brought it back and then made a delivery, it seems to me it would be competent." The Court then overruled the objection.

Witness then stated that he did not understand the question and Counsel for the Prosecution objected that the question was incomprehensible; whereupon, Counsel for Defense withdrew the question and asked the following question: "After you brought the car to the station, and before you delivered it over to the agents, what was done with the car?" and witness answered: "Completely unloaded, and the car itself was taken behind the police station." That the car was turned over to the Federal Officer completely unloaded and reloaded after such delivery. That witness had made an answering affidavit to preliminary motions in the case on the day before the beginning of the trial. That Mr. Breed did not give him any reason for wanting the affidavit other than that he wanted the facts briefly. That witness did not know as Mr. Breed [fol. 43] said he wanted all the facts. That witness had a conversation with Mr. Breed and Mr. Breed then dictated the affidavit, asking witness if that were true in regard to the parts as they were dictated. That Counsel for Defendants was standing there at that time and heard the affidavit dictated. That witness did not recall that Mr. Breed asked him if there was anything more. That Mr. Breed dictated the statement and asked witness if he was right. The Court then ruled that Counsel for Defendant

should first refer to something in the affidavit claimed to be inconsistent with witness' testimony at that time, before questioning witness further on the subject. Counsel for Defense then asked witness if he stated anything about shaking the car or hearing bottles rattle, in that affidavit, and witness replied that he did not know whether he did or not. Counsel then asked: "Did Mr. Breed ask you, after you had make your statement, if there is something further, and did he suggest that you put in something further?" to which Mr. Breed objected. The Court sustained the objection, and the Defendants excepted to the ruling. The Court then ruled: "If there is anything in this affidavit which you say is inconsistent call his attention to it, and ask him what it was, and then, if you want to go into circumstances under which such statement was made, under reasonable limit, you may do so; but until there is something in the affidavit, which, from your view, is inconsistent with something he has testified to to-day, you can not go into that question any further," to which ruling of the Court the Defendants, by their counsel, then and [fol. 44] there duly excepted and said counsel stated: "I am trying to just get, if I can, if the Court please, whether or not this witness, at that time was asked to state fully, and was aided by suggestion of counsel in stating fully, all the facts." The Government counsel then stated: "We are not concerned whether he was asked to state fully the facts, or whether or not he was asked only four or five questions." Defense Counsel then stated: "I want to show it because it is very enlightening." The Court then ruled: "We will not have any further remarks in the presence of the Jury on that subject. We will have to go directly to the affidavit. Otherwise, the Court will exclude any further testimony about this time and place as to which you have been interrogating. The witness has answered you that he does not know whether there was or not at that time. That question was not objected to, but if there was an objection it would have been sustained." The Prosecuting Attorney then objected and moved to strike the answer out. The Court granted the motion, to which ruling of the Court, the Defendants by their Counsel then and there duly excepted.

The affidavit referred to was then produced and identified by the witness and offered by the defendants in evidence

for the sole purpose of showing that there was not any statement in it about shaking the car or hearing bottles rattle. The Court then stated: "If you offer that in evidence it will be received unconditionally."

Mr. Breed: "And there will be no objection."

[fol. 45] Mr. Baxter: The only condition I wish to impose is that we do not admit any of the facts therein stated to be true."

But the Court ruled it could not be received under such conditions, but if received that either counsel could draw any inference they thought it bare, to which ruling of the Court, the Defendants by their Counsel then and there duly excepted.

The witness then testified on redirect examination that in a small compartment back of the seat of Defendant's car, he found bottles similar to Government's Exhibit No. 5, and labels on them similar to Government's Exhibit No. 5, to which counsel for the Defendants objected, as being not the best evidence and an improper form of proof. But the Court overruled the objections, to which ruling of the Court, the Defendants duly excepted.

Trooper Travis was then called and on continuation of direct examination testified:

That they overtook Defendant's car in front of Rayno's garage in the Village of Massena. That Defendant Lima jumped out of the Buick car and ran inside of the garage followed by witness, who overtook him in the garage and brought him back. That Gambino was still in the Buick car. That no effort had been made to get into the car that he knew of. That he then took Gambino in the Ford car and drove to the police station at Massena. That Sergeant Carroll and Defendant Lima went to the police station in the Buick car. That he did not recall hearing any conversation in front of the garage. That at the police station the two loaded guns were taken from Gambino and Lima and cartridges and some money, and they showed their revolver permits. That the car and other property seized [fol. 46] from Defendants were turned over to Inspector

Robillard. That he noticed the little compartment in the back of the car. That witness assisted in unloading the bottles from Defendant's car. That Government's Exhibit No. 5 for identification was similar to bottles taken from Defendant's car; and that the labels on said bottles were similar to the label on said Exhibit No. 5.

The Defendants objected to the testimony on the same grounds as they objected to similar testimony when given by witness Carroll, but the Court overruled the objections as before, to which rulings the Defendants duly excepted.

That witness counted the bottles that were in the rear of Defendant's car and they numbered 336 bottles. That the guns and the bottles and their contents were turned over to Mr. Robillard, in the same condition as when they were seized.

Henry Robillard, called as a witness by the Prosecution, testified:

That he was a Deputy Collector and Inspector of Customs stationed at Malone, N. Y., and working under F. S. Steenbaerge, who was also a Deputy Collector of Customs. That on August 1st, 1924, he saw Trooper Carroll and Trooper Travis and the two Defendants at the police station at Massena. That he tried to question the Defendants, but they would not answer or talk to him. That there was a Buick roadster, 336 bottles of Canadian ale, a .25 Colt automatic, and a .32 Dreys revolver, turned over to him by said State Troopers, on that date. That Government's Exhibits Nos. 1, 2, 3 and 4 were so turned over to him. That [fol. 47] immediately thereafter he took four bottles up to the office at Malone and locked them up and next day he turned them over to Mr. Steenbaerge, in the same condition in which he had received them from State Troopers. That Government's Exhibit No. 5 was one of the bottles he had turned over to Mr. Steenbaerge on that day.

To all of which testimony the Defendants, by their counsel, objected on the ground that it was irrelevant, incompetent and immaterial. That it was statements of conclusion or opinion on the part of the witness. That the witness

was not shown qualified to give such opinion evidence; and that said evidence was not a statement of facts within the witness' knowledge. But the Court overruled the objections, stating that Counsel for the Defense might interrogate the witness on cross-examination about his knowledge. To which rulings of the Court the Defendants, by their counsel, then and there duly excepted.

That at the time he turned said Exhibits over to Mr. Steenbaerge, he stated to him where he got them, and that Mr. Steenbaerge wrote the label out on the typewriter and put it on Government's Exhibit No. 5.

To which testimony the Defendants, by their counsel, made the same objections. The Court made the same rulings, and Defendants duly excepted. The same testimony was given as to Government's Exhibit No. 6, over the same objections and exceptions of the Defendants.

F. F. Steenbaerge, called as a witness for the Prosecution, testified:

That he was a Deputy United States Collector of Cus- [fol. 48] toms stationed at Malone, N. Y., and was on August 1st, 1924, at which time he had fifteen men working under him, one of whom was the previous witness Robillard. That he recalled Mr. Robillard turning over some bottles with labels on to him, on August 2nd, 1924. That he could not say whether he pasted the typewritten labels on Government's Exhibits Nos. 5 and 6, which were two of said bottles, or whether one of the men in the office pasted them on.

To which testimony the Defendants, by their counsel, duly objected as irrelevant, incompetent and immaterial. But the Court overruled the objections, to which rulings of the Court, the Defendants, by their counsel, then and there duly excepted.

The witness put eight ounces of the contents of Exhibit No. 6 in a container, sealed it with sealing wax, marked it for identification, and it was sent under registered mail to

the United States Chemist for analysis, on or about the 25th day of August 1924.

Government's Exhibit No. 7 for identification was then shown witness, who testified that it was the bottle in which he put the contents of Exhibit No. 6 and forwarded it to the United States Chemist for analysis. That in witness' presence, a Mr. Whitney, Deputy Collector under witness, put part of the contents of Exhibit No. 6 into Exhibit No. 7 "if that is the bottle and it looks the same," and immediately sealed it and stamped a letter "S" on the top of the bottle in the sealing wax, and sent it by registered mail to New York City. That the cap was not removed from No. 6 until part of its contents was put in No. 7 as de-
[fol. 49] scribed.

To which testimony the Defendants made the same objections as before, the Court the same rulings, and the Defendants excepted.

That witness kept Exhibits Nos. 5 and 6 in his possession from the time they were turned over to him by Mr. Robillard until he took the contents from one of the bottles and put it into the other bottle to send to the Chemist for analysis, and that the bottles were in the same condition throughout that time.

Defendants made the same objection as before, the Court the same rulings, and the Defendants excepted.

That witness did not know exactly whether Exhibit 7 was in the same bottle he forwarded or not. That "I think it is. I do not think that label could have been taken off and pasted on another bottle." That he knew the label was the same one and that — bottles were similar in all respects. That he had kept Government's Exhibit- Nos. 5 and 6 for identification, continuously in his possession since the 25th day of August, 1924. That they had been wrapped with paper around each bottle and two wrapped in a package and tied up with twine and tagged with the number of the case and stored away with witness' other samples in a room adjacent to his office in Malone.

To which testimony the Defendants objected as before, the Court overruled objections and Defendants duly excepted.

That Government's Exhibit No. 5 was in all respects similar and in the same condition as it was the day it was turned over to witness, with the exception of the typewritten label.

Defendants made the same objection. Prosecuting At- [fol. 50] torney stated he was referring not to the contents of the bottle, but to its physical features and was excluding the typewritten label Mr. Steenbuerge had pasted on it. The Court overruled objections and Defendants excepted.

The Court then recessed until May 25th, at which time Trooper CARROLL was recalled and testified:

That at the time of arresting the Defendants they told him they lived in Utica.

JOSEPH D. RUBIN was next called by the Prosecution and testified:

That he was a chemist employed by the United States Government at New York City, and had been for more than a year. That Government's Exhibit No. 7 was received at his place of business on Washington Street, in New York City, during the latter part of August, 1924. That he made a chemical analysis of the bottle for the alcoholic content, and was then asked to state what he found said alcoholic content to be.

Defendants objected on the grounds that the search and seizure by which this sample was alleged to have been obtained was made without any warrant or authority in law, and in violation of the constitutional rights of these Defendants, to be immune from unreasonable searches and seizures of their persons, property and effects, to not be deprived *to* their property without due process of law and to not be compelled to give evidence against themselves, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; that said arrest and

[fol. 51] seizure was not authorized by Section 26 of Title II of the National Prohibition Act, under which said Officers assumed to be acting; that there was not any State law, under which said officers claimed to be acting; that upon the further grounds that there was not sufficient evidence that the sample, an analysis of which was then being offered in evidence, was ever in the possession of or being transported by either of these Defendants.

The Court then inquired of Counsel for Defense wherein the proof failed; and Counsel pointed out as follows: One Federal Officer Robillard says that on the 1st day of August, 1924, there was delivered to him by the State Troopers a certain number of bottles. That four of these bottles were the next day with their contents delivered to Deputy Collector of Customs Steenbaerge. There was no testimony of any marking nor identification nor sealing. They were then kept, according to the testimony of the Deputy Collector, for more than three weeks, unsealed, unprotected from any alteration, addition or chemical change. That the proof fails in the continuity of possession, and in the identity of the article. Robillard testified that he saw Steenbaerge seal it on August 2nd; Steenbaerge testified that he either labeled it or saw it labeled at that time. That more than three weeks thereafter, to wit, on August 25th, he had Exhibit No. 7 sealed and mailed to the chemist from his office. The evidence of these witnesses is too indefinite, and uncertain, to constitute legal grounds for receiving the analysis offered in evidence, and such testimony as they [fol. 52] do give, consists mostly of their conclusions and their opinions, and fails to recite facts within their knowledge sufficient to constitute proper grounds for admitting the testimony of the chemist as to his analysis.

Witness STEENBAERGE was then recalled by Counsel for the Prosecution and was asked: "State what you know about this label on that bottle, Exhibit No. 7." And witness testified: "That label was typewritten in my office and given to me and I put my letter on it and gave it to Mr. Whitney, who is a Deputy Collector, and in my presence he pasted this label on the bottle, put the contents of one of

these bottles" (supposedly in Government's Exhibit No. 7) "sealed it up with red sealing wax, and put a seal, letter "S" on top of the sealing wax, and it was put in the container and packed in cotton batten and sent by registered mail to United States Appraisers' office at New York City." Witness then testified that he delivered last Tuesday Government's Exhibit No. 5 for identification, at request of Prosecuting Attorney, to Mr. Rubin, the chemist, who had been called as a witness in this case.

The Prosecuting Attorney then asked: "And did you deliver it to him in the same condition as it was when you received it?" The Defendants, by their counsel, objected to the question as leading, as calling for a conclusion, and as being improper in form. The Court then asked Counsel for the Prosecution what the question referred to. Counsel answered, "to Government's Exhibit No. 5 for identification."

The Court: "To whom did he deliver it?"

Mr. Breed: "To Mr. Rubin, the chemist, who was on [fol. 53] the stand a few minutes ago."

The Court: "Recently?"

Mr. Breed: "Yes, sir."

The Court: "When?"

Question by Mr. Breed. "When did you deliver it to Mr. Rubin?"

Witness: "The day that Court was held here, or adjourned, I mean."

Question. "Last Tuesday?"

Answer. "That was the day."

The Court: "The question is did he deliver it to him in the same condition as now?"

Mr. Breed: "No, the same condition as when Mr. Steenbaerge received it from Mr. Robillard."

The Court: "Of course, he testified he took some of the contents out after receiving it from Mr. Robillard."

Mr. Breed: "This is not the bottle."

The Court: "It is not the bottle?"

The Witness: "No. It is full."

The Court: "Objection overruled."

To which ruling the Defendants, by their counsel, then and there duly excepted.

Counsel for the Prosecution then repeated the question in the following form: "Did you deliver it to him in the same condition as it was when you received it from Mr. Robillard?"

Witness: "I should say it was in the same condition with the exception that when it was received by me, this label was not on the bottle. That was put on in my office, and there may have been a small label on there. But with those exceptions, it was the same."

Mr. Baxter: Just a moment, I object to that part of the testimony which is not responsive to the question, and I move that it be stricken out.

The Court: "I think I will let it stand. It will only require another question, and it is appropriate to the subject [fol. 54] under examination."

To which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

The Prosecuting Attorney then asked: "And, that is, you delivered it to the chemist in the same condition as it was when you received it, with the exception of the typewritten label on it?" The Defendants objected to the question, as being improper in form, leading and calling for a conclusion, and the witness not shown qualified to answer. The Court then ruled: "It is unquestionably leading; but a summary of what he has testified to."

Mr. Breed: "Yes, it is but a summary of what he testified to."

The Court: "And, for that reason, it is repetition and is not necessary, but you may have it for the purposes of clarity."

To which rulings of the Court, the Defendants, by their counsel, then and there duly excepted.

Witness answered: "Yes sir."

On cross-examination witness was asked how he was able to say that the contents of that bottle was in the same condition at the time he delivered it to the chemist on the 18th day of May, 1925, as it was at the time he received it on the 2nd days of August, 1924. In reply he stated: "Why, I could say it was in the same condition with the exception of

the label on there." And being further pressed as to his knowledge or reason for saying so, testified that he had no knowledge or reason. That he did not know what the contents are. That he did not know at any time as to the contents of the bottle. And that he meant by his testimony to refer only to the label and the bottle. Defendants, by [fol. 55] their counsel, then moved, in view of this testimony, to strike out the former testimony of the witness, on the subject, but the Court ruled: "I am not sure that the witness understood exactly your questions. The District Attorney may ask him further, if he cares to."

On re-direct examination of the witness the following question was asked: "You know the contents which were in the bottle when you received it from Mr. Robillard were the same contents which you turned over to Mr. Rubin?" Counsel for Defense objected to the question as leading. The Court ruled: "It is leading in form. Ask him Do you know, etc."

By Mr. Breed: "And do you know?"

Answer. "I do know."

Question. "And were they the same?"

Answer. "Yes, sir."

Question. "The same contents?"

Answer. "The same contents."

Question. "And you are referring to Government's Exhibit No. 5 for identification?"

Answer. "Yes, sir."

The Court. "The motion to strike out is denied," to which ruling of the Court the Defendants, by their counsel, then and there duly excepted. The cross-examination was then continued and the witness as asked: "How do you know?" and he answered: "That bottle was in my possession in my office and under my supervision until it was brought here; and while here, at Court, it was in my possession, when it was not locked up under my supervision, until turned over to Mr. Rubin, and it has not been tampered with." That he did not watch it for the nine months personally, but could tell whether the cap had been taken off [fol. 56] the bottle and another one put on. That he could tell it because it had not been. That he knew it was not long in his office or while he was at Court. That he wasn't in his office watching it, but knew it was taken proper care

of. The witness was then asked: "How do you know that?" and answered: "How do I know anything? I have sworn I know that." That the sample was packed away under the supervision of witness by Deputy Whitney, who was the only one that had anything to do with that sample "only himself." The witness: "This sample was labelled in my office the same day that I received it from Mr. Robillard, and it was packed away with similar samples which I have in the office, and there was no one that had access to my office with the exception of men who were under my employment, my own official family." That he did not watch said Whitney for those three weeks between August 2nd, 1924 and August 25th, 1924. That he knew it because he had sworn before that it was in the same condition. That he could tell by this bottle and another bottle from observation. That if the cap had been removed, the contents would become stale and without foam. That the cap cannot be taken off and put on properly; that it would have "to be put on with a machine and have to be Dow's Canadian Ale, or some others, and the cap would have to be put on in that way," and that on such machine and no such caps had been used on bottles in his office. Counsel for Defense moved to strike out that part of the answer referring to Canadian ale or some particular brand. But the Court denied the motion and the Defendants duly [fol. 57] excepted.

That samples are labelled as they come into witness' office and packed away with other samples and not removed from that place until by witness' instructions. That when that sample was taken from the other samples, it was taken by instructions of witness by Mr. Whitney. That wtiness gave Whitney the label to put on the Exhibit No. 7, the contents of which were taken from one of the four bottles.

That he could not say on just what date the label was placed on Exhibit 7, but it was the same day it was sent to New York City. Defendant, by their counsel, moved to strike out witness' testimony as not being responsive to the question how he knew the contents of Exhibits Nos. 5, 6 and 7 were the same and in the same condition from the time he received samples from Mr. Robillard until samples were turned over to the United States chemist. But the court denied the motion, to which ruling of the Court the

Defendants, by their counsel, then and there duly excepted. That the 25th of August, 1924, was the time witness put his initials on the typewritten label on Exhibits Nos. 5 and 6 That that was the first date he had put any mark of identification on samples or Exhibits Nos. 5 and 6. That he knew the typewritten labels were pasted on in his presence and in his office, but he did not know when. Asked how he knew it was done, if he did not know when it was done, witness testified: "I swore I either saw it or done it:" That he did not know whether he had any further knowledge than what he had sworn to or not. That he had given [fol. 58] what knowledge he had and what he could recall. That no mark of identification was put on the cap of the bottle at any time. That he was not able to distinguish that particular cap from thousands or millions of others of the same kind. That he did not know whether it was the same cap on any of the bottles at any time, as at the time he had received the bottles. That he did not know whether there were many cappers that fit that size cap and that size bottle, but had seen some. To the question: "The only knowledge you have is that which you have already recited, that at the time the contents were taken from it, you saw a cap on it and that it appeared to be lively at that time?" Witness testified that was not the only reason: and being asked: "What additional reason have you?" testified that the bottle was turned over to him by Deputy Robillard. That he signed his name on typewritten labels which were either pasted on the bottles by witness or in his presence and the said bottles were packed away with samples which he retained for evidence and were not taken from the place until sent to United States chemist for analysis under instructions of witness. The Defendants then moved to strike the answer out as not being responsive and as being a statement of conclusions or opinions of witness rather than of facts within his knowledge. By the Court denied the motion, to which Defendants, by their counsel, duly excepted. The Court then ruled: "You asked him for what other reasons and he has given you an answer at some length. I hold that is a responsive answer and deny your motion to strike it out, and [fol. 59] I do not see any occasion for repeating the question and I shall sustain the objection to your repeating

the question," to which ruling of the Court the Defendants, by their counsel, duly excepted. Witness was then asked: "Now have you stated all the reasons you have for saying that you know the contents of that bottle Exhibit No. 6 were the same when delivered to you, as when you poured a part of it into Exhibit No. 7?" and answered: "I could not answer that question yes or no. I think it is all the knowledge I have, but there might be some other knowledge. I do not recall at the present time." Counsel for the Defense moved to strike out the answer as not being in accordance with the instruction of the Court to answer yes or no. The Court denied the motion and the Defendants duly excepted.

After the noon recess and on re-direct examination witness testified that he received Government's Exhibits Nos. 5 and 6 from Mr. Robillard on the 2nd day of August, 1924. Witness was then asked "What did you do with reference to them?" Counsel for Defendants objected to the question as repetition, the witness having already testified fully on the subject. The Court ruled: "He did at some length on cross-examination, and to think on the direct also."

Mr. Breed: "This is only to clear up the impressions that Mr. Baxter has just made in the minds of the Jury."

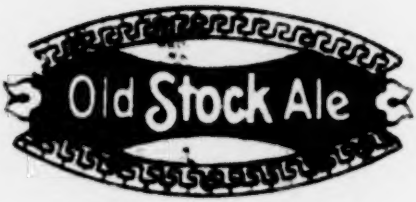
The Court: "Objection overruled."

Mr. Baxter: "And exception."

The witness then testified that from the time he received [fol. 60] these bottles on August 2nd, 1924, in his office and signed these labels, that were there placed on the bottles, they were put away with the rest of his samples, until the 25th day of August, 1924, when they were taken out and a part of the contents of one bottle put in a container, sealed with wax on which was stamped the letter "S" and sent by Registered mail to the United States chemist's office in New York City. That the empty bottle and the full bottle were then wrapped in paper, tied up with string and tagged and filed away in the room where witness kept all his samples that have been sent away. That the full bottle, Exhibit No. 5, was kept there until witness brought it from Malone to the Court and turned it over to Mr. Rubin, the chemist. Prosecuting Attorney then asked: Whether or not it was in the same condition when you turned it over to Mr. Rubin

the chemist, last Tuesday (May 18th, 1925) as you have stated, as it was when you received it from Mr. Robillard, August 2nd, 1924, as you have heretofore testified, with the exception of the typewritten label, which appears on the Exhibit?" Defendants objected to the question as being leading, improper in form, and called for a conclusion of the witness. But the Court overruled the objection, to which ruling of the Court the Defendants, by their counsel, then and there duly excepted. The witness then testified: "It is."

Witness RUBIN was recalled for the Prosecution and was asked by the Prosecuting Attorney: "Now, Mr. Rubin, will [fol. 61] you state the alcoholic contents of Government's Exhibit No. 7?" The Defendants, by their counsel, objected on all the grounds previously stated and that the evidence had been unlawfully obtained by two State Troopers, who, according to their own testimony, were not authorized by any State or Federal law, to interfere with the liberty or property of the defendants. That their action in making this search, seizure and arrest, was in itself, a violation of the Criminal Law. That it was contrary to public policy for the Court to receive at their hands evidence which had been shown to have been obtained by such lawlessness and criminal interference with the liberty and property of citizens. But the Court interrupted as follows: "State your objections without argument. Objection overruled," to which ruling of the Court the Defendants, by their counsel, then and there duly excepted. The witness then answered: "5.90% absolute alcohol by volume." Witness then testified over objections and exceptions of Defendants that Exhibits were fit for beverage purposes. That Exhibit No. 5 was turned over to witness by Mr. Steenbaergo August 18th. That the bottle was full at that time. That there was a cap on the bottle at that time. That witness made a chemical analysis of the contents. That the alcoholic content was a 5.90% absolute alcohol by volume, and that it was fit for beverage purposes. To all of which testimony Defendants, by their counsel, then and there duly objected, but the Court overruled the objections, and the Defendants, by their counsel, duly excepted.


Old Stock Ale


THE NATIONAL BREWERIES LIMITED
PALE BITTER ALE
Wm. DOW & Co.
MONTREAL

[fol. 62] Government's Exhibit No. 4, cartridges, were then offered in evidence. The Defendants objected as being irrelevant, incompetent and immaterial. The Court ruled there must be continuity of possession shown. Defendants waived continuity of possession objection, stating by their counsel that they wanted this objection squarely on the inadissibility of the evidence as being irrelevant, incompetent and immaterial. The Court then overruled the objection and received the evidence, to which ruling of the Court, the Defendants, by their counsel, duly excepted.

Government's Exhibits Nos. 5 and 6 were then offered in evidence. The Defendants, by their counsel, objected on all the grounds previously stated and upon the further ground that some notations had been added, some purported statements of fact which were not made in the presence of the Defendants, referring to the typewritten labels. The Court ruled the objection as to the typewritten labels was sustained, but the bottles with their printed labels were received in evidence, to which ruling of the Court the Defendants, by their counsel, then and there duly excepted.

Government's Exhibit No. 7 was then offered in evidence and received over like objections and exceptions, of defendants.

(Here follows Government's Exhibit No. 7, marked side folio page 62a)

On cross-examination witness testified: That bottles containing a cereal beverage implanted with the yeast or fermentation principle which produces alcohol, kept during [fol. 63] the month of August, subject to the summer heat and being below one-half of one per cent of alcoholic content on the 2nd day of August, might develop not over 2-10 of 1% greater alcoholic content. That if the caps were not on, it might increase up to 11%. That the fact of their being capped in the opinion of the witness limited fermentation in this way; that if it is capped and fementation takes place, carbon dioxide would be generated, which would increase the pressure and break the bottle, and the fact that the bottle was not broken shows that no fermentation of any appreciable quantity took place. That if there was a

slight leak of gas at the bottle cap, there would be no pressure in it. That pressure was there when witness opened the large bottle on May 18th, so that he knew it had not leaked. That if the cap leaks slightly under the pressure of fermentation, so that there was an escape of gas from the bottle, the alcoholic content might increase from below one-half to more than eleven per cent during the time from August 2nd to August 25th. That witness had no knowledge of any of these bottles until his arrival to testify at this trial when one was turned over to him, except the small bottle, Exhibit No. 7, which had been previously received by him through the mail, and knew nothing about their condition as to being capped or cap leaking prior to that time. That the large bottle was capped when it was handed to him. That there was also a new cork in it.

On re-direct examination witness testified over objections and exceptions of Defendants that there was some force or [fol. 64] pressure on the bottle at the time he removed the cap on May 18th. That that indicated to his mind that the bottle had never been opened before since it was capped in the factory. That a bottle similar to this, assuming there was a slight leak, and that there was some yeast fermentation added, would cause the alcoholic content to increase and that when he answered Mr. Baxter's question that it would increase from less than one-half of one per cent of alcohol by volume to eleven per cent, he assumed that the bottle had been opened and a yeast fermentation added.

The Defendants then rested.

The Defendants, by their counsel, then moved to direct a verdict of not guilty on Count I of the Indictment, Conspiracy, as to each of the Defendants, upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, aginst either of said Defendants: that all of the evidence had been illegally obtained by means of the false arrest and the unwaranted and unlawful search and seizure of Defendants' property, in violation of their constitutional rights, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. But

the Court denied the motion, to which ruling of the Court the Defendants, by their counsel, then and there duly excepted.

The Defendants then moved to direct a verdict of not [fol. 65] guilty on Count II of the Indictment, smuggling, as to each of the Defendants, on the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count against either of these Defendants. The Court thereupon granted said motion and dismissed Count II of the Indictment.

The Defendants then moved to direct a verdict of not guilty on Count III of the Indictment, Possession, as to each of the Defendants, upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said Defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their constitutional rights, as guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; and that the law under which this count was found was unconstitutional, because neither the Eighteenth Amendment nor any other part of the Constitution of the United States authorized to Congress nor delegated to the United States the power to pass such a law, nor did the Constitution prohibit to the States the power to pass such a law; therefore such power is reversed under the Tenth Amendmento to the Constitution of the United States to the States respectively, or to the People; but the Court denied the motion, to which rulings of the Court, the Defendants, by their counsel, then [fol. 66] and there duly excepted.

The Defendants then moved to direct a verdict of not guilty on Count IV of the Indictment, transportation, as to each of the Defendants, upon the grounds that there was not any evidence or not sufficient evidence to warrant the jury in finding a verdict of guilty on said count, against either of said Defendants; that all of the evidence had been illegally obtained by means of the false arrest and the unwarranted and unlawful search and seizure of Defendants' property, in violation of their constitutional rights as guaranteed by the Fourth, Fifth and Sixth Amendments to the

Constitution of the United States; but the Court denied the motion, to which ruling of the Court the Defendants, by their counsel, then and there duly excepted.

Counsel for the Defendants then summed up the case for the Defense.

The Assistant United States Attorney summed up the case for the Government.

The Court then charged the Jury as follows:

"Gentlemen of the Jury: These two Defendants are on trial before you on an indictment charging offenses against the laws of the United States. There are three of the four charges now remaining, the fourth having been dismissed by the Court; and I may say that because motions of the Defendants have been denied it should not indicate to you, and you are not to take from that that the Court thinks the Defendants are guilty or not guilty. It only means that it is a question for the Jury. It is never a question for the [fol. 67] Court to decide, unless there is no evidence. The Court held, with reference to the importation charge, that there was not sufficient evidence as to that count to warrant the jury in passing on it. The fact that the Court has denied the motions as to the other counts is not to be taken by you as indicating that the Court has any belief upon the guilt or innocence of the Defendants as to the other three counts. It only means that, in the view of the Court, there is evidence that the jury must pass on and decide the question as to the guilt or innocence of the Defendants; for you, the jury, are the judges of the facts. The Court does not judge the facts. The Court determines the law, and the jury are the sole and exclusive judges of the facts.

"I may say also at the outset that there is no question for you to decide here as to whether these Defendants were lawfully stopped and apprehended and arrested and their automobile and its contents seized. That is a question of law which the Courts, supposedly trained in the law, are called upon to decide. It is not a question of any kind for the jury.

"So there is no such question in this case for you to decide and you are to give no consideration whatever as to whether or not any constitutional or other rights of the

Defendants have been violated in this case. Under the circumstances of this case, such a question is not in the case for you, and you are to decide only whether or not the De- [fol. 68] fendants are guilty of any or all of the three charges in this case. Those three charges are conspiracy, possession and transportation, and there is nothing in the case for you to pass on as to whether or not any rights of the Defendants have been violated.

"Now, the charge of conspiracy is that these two Defendants, with themselves or with others, conspired to violate certain laws of the United States, namely, the customs laws and the prohibition laws, by bringing into the United States and by possessing and transporting in the United States certain intoxicating liquors. A conspiracy means an agreement, an agreement to violate some law of the United States followed by some act called an overt act in carrying out the conspiracy. The agreement alone, without any act carrying it out, is not sufficient. There must be some act done by the so-called conspirators before a conspiracy has been established under the law.

"It is not necessary, in order to establish a conspiracy, that the government produce evidence of any of the alleged conspirators as to the terms of the agreement. It is not necessary that there be any ear witnesses of any agreement. It is not necessary that any document be produced containing the terms of the agreement.

"You will readily understand that if persons, not being these Defendants, but any persons, are about to violate the law and make some agreement to that effect, they desire it [fol. 69] kept a secret. They take care that no one overhears them. They put nothing in writing and they endeavor to keep everything as secret as may be, and so it is not necessary that an agreement to violate the law should be established by any such evidence as would be necessary to establish an ordinary contract in a civil action.

"If the Government has proved facts and circumstances and acts which convince you beyond a reasonable doubt that there was and must have been an agreement, why then the government has proved its charge of conspiracy as fully and as completely as if it had proved by one of the alleged conspirators the terms of the agreement.

"I may, perhaps, illustrate to you how an agreement may be inferred from the acts of the conspirators, or the per-

sons so charged, and this illustration I propose to give you, of course, has no relation to the Defendants. It is simply to illustrate that you do not need to have any proof of the terms of the agreement to find that there was an agreement, that if from the acts and facts and circumstances you can determine that there must have been an agreement then it is as fully and completely proved as if the actual terms of the agreement were proved by one who took part therein.

"This illustration is this: Suppose this were a country in which duelling was the custom, where men fought duels [fol. 70] on points of honor or otherwise, and suppose at daybreak on some morning you saw two men enter a forest, one carrying a sword and another carrying what looked like a physician's bag; that they went through the forest until they came to a clear space in the middle thereof, and then you saw two men approaching from the opposite side of the forest, one likewise with a sword and the other likewise with a bag that looked like a physician's bag; that you saw them meet in the center of this clear space, that the two men with the swords shook hands with each other, drew their swords from their scabbards, paced off a certain distance, turned and faced each other and began to fight with the swords, while the men with the bags stood a short distance away. You would not need any more than that to know that there had been an agreement made that these men would meet at this particular hour and this particular place to fight a duel. You would not need any one to tell you that they heard the agreement; you would not need to have any one submit to you any agreement in writing.

"Now, this has absolutely no application of any kind to the case at bar. It is only for the purpose of illustrating to you by as simple and as forceful an illustration as I can think of that you may determine that there was an agreement from the subsequent acts and facts and circumstances.

[fol. 71] "Now, returning to the charge here, the government says that there was an agreement between these two persons that they would go North into Canada or near Canada, and obtain intoxicating liquors and transport them into and through the Northern part of the State of New York. The government has produced no one who heard an agreement, it has produced no one who saw any docu-

ment in writing, but the government says that it has shown to you two men who live in the central part of the State, in the city of Utica, some long distance away from their homes near the Canadian border on a road which leads from a place called Hogansburg, which, according to the evidence is about a mile or a mile and a half from the Canadian border, this road leading westerly from Hogansburg to a place called Massena; that they were in a car the springs of which sagged down; that in the village of Massena they stopped in front of a garage. One man got out and ran or walked, I do not recall the evidence as to which he did, but he went into the garage, and the other man remained in the car. That the two State Troopers who had been following them for some distance arrived at about the same time, or very close behind them, as I recall. That one State Trooper ran after the man who went toward the garage, and that the other talked to the man remaining in the car. As I recall it, the man who remained in the car was Gambino. Am I right?

[fol. 72] "Gambino, the defendant, who remained in the car, is the stouter one of the two defendants, the one who sits with his back to the jury, and the man who ran to the garage or walked to the garage, whichever it was, is Lima, the younger, apparently younger, and slighter man, who sits between Gambino and the counsel for both of the defendants. That some conversation occurred between the one officer and Gambino who remained in the car. The officer asked Gambino what he had on and he was told to find out, that he shook the car to discover; that he heard the rattle of bottles; and that the other defendant was brought back; that he asked for the key of the car and none was given to him; that he was told to find out; that the key was subsequently found in a pocket of the car; that the car was a closed car, called a roadster; that they opened a compartment in the rear of the car and one back of the seat and they found three hundred and thirty-six bottles, amounting to about thirteen cases as I recall the evidence; that the defendants were then taken over to the police headquarters in Massena and placed under arrest. Some of the bottles were delivered to the customs authorities and thereafter analyzed and the contents appeared to be intoxicating

liquor by the analysis made of part of it at this time and part of it some weeks after the time of the seizure.

"The government says by that proof it has established [fol. 73] that these men were there by agreement, that they went up there to get a load of Canadian ale or other intoxicants and were in the very act of transporting it and carrying out that agreement when they were apprehended and arrested by these State Troopers who have been produced as witnesses here before you; that they could not have been there except by that; that it could not be by a coincidence that two men from Utica could be up there in a car so near the Canadian line, driving from one place near the Canadian line on the way back towards Utica, each with a revolver loaded; that it could not be a coincidence, that it must have been pursuant to an agreement.

"If you are satisfied beyond a reasonable doubt that there was an agreement and that these men were there by this agreement and that they were doing something in carrying out that agreement, why, then, you may find them guilty of conspiracy.

"The Defendants contend that the evidence does not warrant any such inference. The Defendants say there were no bottles visible, that there is nothing to indicate that the one Defendant, Lima, had any knowledge that there were any bottles there, and had no knowledge that any law was being violated; that the evidence does not show but that he was a passenger; that he was there by accident, or that he was there without any reference to any crime and [fol. 74] not in carrying out any agreement, and that he was there and that he was in the car an entirely innocent man and in utter ignorance of the fact that any law was being violated, or that there were any intoxicating liquors in the car.

"If that be so, then, as far as the Defendant Lima is concerned, he is not guilty of conspiracy, he is not guilty of any other offense if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made.

"The charge of conspiracy here is not limited to an agreement between these two Defendants. Whether or not Lima was a participant in any conspiracy, if Gambino was

transporting Canadian ale or any other intoxicating liquors, he must have obtained them from someone else, unless he manufactured them himself, and if he manufactured them himself, it is a reasonable inference that he procured the materials from someone else, but disregarding the questions of materials and manufacture, he lives in Utica, he had a considerable quantity, he was near the Canadian line, if you can say that, regardless of Lima, he must have obtained this from some other person and did not manufacture them himself without the assistance of any other person, if you are satisfied beyond a reasonable doubt that he did co-operate with some other person, either Lima or someone else, if you are so satisfied beyond a rea- [fol. 75] sonable doubt, you may find him guilty of conspiracy on either one of two theories, that he and Lima made an agreement between themselves, with or without anyone else, and they were there in the act of carrying it out, or if Lima was innocent that Gambino had agreed with some other person to procure for him or get for him to sell to him intoxicating liquors, and that that had been done and he was in the act of transporting it to another place, if you are so satisfied beyond a reasonable doubt, why, then, Gambino is guilty of conspiracy whether Lima is or not.

"I will come now to the question of possession and transportation. If you are satisfied beyond a reasonable doubt that there were intoxicating liquors in that car and that Gambino and Lima knew there were intoxicating liquors in that car, then they are guilty of possession, unless they have shown you that they obtained them lawfully, without violating the prohibition law. They have made no effort to show you that they obtained them lawfully. The proof is wholly that of the government. So, if you are satisfied beyond a reasonable doubt that there were intoxicating liquors in that car and Gambino and Lima knew they were in the car, then they are guilty of possession. If only one knew it, why, then, the one who knew it is guilty of possession. If neither of them knew it and they were both innocent of any knowledge of the contents of the car, then neither of [fol. 76] them is guilty.

"Transportation is like possession. If there were intoxicating liquors in that car and if Gambino and Lima were consciously and knowingly transporting them and you are

satisfied of both of those facts by evidence which convinces you beyond a reasonable doubt, then they are both guilty. If one consciously and knowingly did it and the other was in utter ignorance, why, then the one and only the one who consciously and knowingly did it is guilty.

"The fact that the Defendants have not taken the witness stand in this case is not to be taken by you as any indication of any kind that they are guilty of anything nor taken by you as in any way adverse to them. It is a right which the law gives and the courts are bound to protect on the part of any such man charged with crime, to require the government, or the People in the State court, to prove its claim, and the Defendant may elect not to take the stand and nothing adverse to the Defendant, no inference, no deduction, nothing in anywise adverse to the Defendant may be drawn therefrom.

"This is a criminal case and the burden of proving the guilt of the Defendant beyond a reasonable doubt rests upon the government. The presumption of innocence in a criminal case is in favor of the Defendant and mere preponderance of the evidence is not sufficient to justify a verdict [fol. 77] of guilty in a criminal case. The burden of proof is upon the Prosecution and it must prove every material fact and establish the guilt of the Defendants to your satisfaction beyond a reasonable doubt. The degree of satisfaction and certainty required is not absolute conviction or certainty, but the evidence must produce that effect on the minds of the individual jurors so that after its consideration each juror can, in view of his oath, have no reasonable doubt of the guilt of the accused. By reasonable doubt I mean a doubt arising out of the evidence and not an imaginary doubt, a fanciful conjecture or a strained inference, but such a doubt as a reasonable man would act upon or decline to act upon when his own concerns are involved, a doubt for which a good reason can be given, which reason must be based on the evidence or want of evidence. Where such a doubt exists, the accused is entitled to its benefit and should be acquitted; but where the evidence is satisfactory to an impartial mind that the crime was committed and that the Defendant committed it as charged, when the mind comes naturally and reasonably

to such a conclusion from a fair consideration of the evidence, then there can be no reasonable doubt and the prisoner should be convicted; and, of course, that applies to each one separately and to both together. That is to say, wherever more than one is concerned, it applies to both, and otherwise it applies to each one separately; and you [fol. 78] must decide this case with reference to these two defendants as if each were on trial separately. You must view each Defendant's case by itself in arriving at your verdict.

"So, take this case, gentlemen, and decide it. You may find the Defendants guilty or not guilty of each of the offenses, or of some of them and not the others, or of none of the offenses or of all. You may find one guilty and the other not guilty, if you so decide, and you may find them both not guilty or both guilty."

The Defendants, by their counsel, then and there, and before the Jury retired, excepted to the following parts of the Court's charges:

"If you are satisfied beyond a reasonable doubt that there was an agreement and that these men were there by this agreement and that they were doing something in carrying out that agreement, why, then, you may find them guilty of conspiracy."

"If that be so, then, as far as the Defendant Lima is concerned, he is not guilty of conspiracy, he is not guilty of any other offense, if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made."

"So, if you are satisfied beyond a reasonable doubt that [fol. 79] there were intoxicating liquors in that car and Gambino and Lima knew they were in the car, then they are guilty of possession. If only one knew it, why, then, the one who knew it is guilty of possession. If neither of them knew it and they were both innocent of any knowledge of the contents of the car, then neither of them — guilty."

"If the jury are satisfied by evidence which convinces them beyond a reasonable doubt that these two Defendants or either of them had in their possession intoxicating liquor,

and knew that it was intoxicating liquor, that warrants a verdict of guilty."

Thereupon, Counsel for the Defendants, and before the Jury retired, requested the Court to charge as follows:

That before one or both of the Defendants could be found guilty of conspiracy, there must be proof beyond a reasonable doubt that these two Defendants or whichever one was found guilty made a distinct and definite agreement of conspiracy within the Northern District of New York.

The Court then charged:

"Yes, of course, the agreement must have been made within the Northern District of New York, but the Northern District of New York, gentlemen, does not mean St. Lawrence and Franklin Counties. Utica, Albany, Auburn, Binghamton, Syracuse are all in the Northern District of New York, and it numbers twenty-nine counties and all the eastern end of the State."

[fol. 80] Thereupon Counsel for the Defendants requested the Court to charge the jury as follows: That the mere fact that these Defendants were together at the time of the arrest and seizure, does not warrant an inference that a conspiracy had been made within the Northern District of New York. That it needs some further proof than that to justify such a verdict.

Thereupon the Court charged the Jury as follows:

"I charge you, Gentlemen, that the mere fact that two men are together does not of itself prove any conspiracy. You must find it from other evidence in the case, together with the fact that they are together, which must convince you beyond a reasonable doubt that there was a conspiracy, before you can find them guilty of such."

Thereupon, Counsel for the Defendants requested the Court to charge the Jury as follows: That there is no duty upon the part of these Defendants or either of them to show anything; that there is no condition created by any of the evidence which here changes the burden of proof or puts them or either of them, under the duty to answer any suggestions in order to establish their innocence.

Thereupon the Court charged the Jury as follows:

"That is true of the charges of conspiracy and transportation, but it is not true of the charge of possession, and, on the contrary I charge and find it necessary to repeat, if the Jury are satisfied by evidence which convince them beyond a reasonabe doubt that these two Defendants or either of them had in their possession intoxicating liquor and knew [fol. 81] it was intoxicating liquor, that warrants a verdict of guilty, unless such Defendant or Defendants has or have satisfied the jury that they did not obtain it unlawfully or that he or they obtained it lawfully, and that no issue of that kind has been made in this case."

The Defendants also then and there, and before the Jury retired, excepted to the ruling of the Court in failing to charge the Jury as above requested by the Defendants.

Whereupon, the Jury retired and brought in a verdict finding both Defendants guilty, as charged in the indictment, on Counts I, III and IV.

The Defendants, by their counsel, then moved the Court to set aside the verdict as being contrary to the evidence, and for a new trial upon all the exceptions taken in the case; but the Court denied the motion, to which ruling of the Court, the Defendants by their Counsel then and there duly excepted.

The Defendants, by their counsel, thereupon moved the Court to arrest the judgment for the purpose of giving the Defendants time to sue out a writ of error, and the Court did so arrest judgment, until the 27th day of May, 1925; at which time the Defendants, by their counsel, moved the Court to set aside the verdict of Guilty on the Count of Conspiracy, against each of the Defendants, on the grounds that the indictment charged that conspiracy was committed in the County of St. Lawrence, and there was no proof as [fol. 82] to where or when a conspiracy was committed, even though there might be some evidence that there had been some conspiracy. But the Court denied the motion, to which ruling of the Court, the Defendants, by their counsel, then and there duly excepted.

Thereupon the Court pronounced judgment upon the verdict and sentenced the Defendants as follows:

"The sentence and judgment of the Court is that each of these Defendants be confined in the United States Peni-

tentiary at Atlanta, Georgia, for one year and one day and that they be fined in addition thereto the sum of ten thousand dollars each. Now, if they have any property I would not fine them ten thousand dollars, if they have any property that would prevent them from taking the pauper's oath. That is on the conspiracy charge. Nothing on either of the other two charges. The confinement on account of the fine at the Penitentiary, Atlanta, Georgia, to be after the expiration of the prisoner's sentence, and the Court will grant your writ of error bill and bail is fixed at five thousand dollars each, and as I understand you have bondsmen here."

This is to certify that the foregoing bill of exceptions tendered by the Defendants is correct in every particular and is hereby settled and allowed and made a part of the record in this case.

Done in open Court this 26th day of February, 1925.

Frank Cooper, United States District Judge.
(Seal.)

[fol. 83] In United States District Court

[Title omitted]

Order Extending Time—August ~~18~~, ~~1925~~

This cause coming on further to be heard before this court on the petition of the above named defendants(Rosario Gambino and Joseph Lima, for a writ of error to review the conviction of said defendants herein upon Counts I, III and IV, of the indictment herein; and it appearing to this court that the said defendants have been unable to procure the stenographic record herein so as to specifically set forth assignments of error; but that said defendants have filed assignments of error herein for the consideration of this court on said application; and a writ of error having [fol. 84] been allowed and filed herein; and due deliberation having been had thereon:

Now, on motion of I. K. Baxter, attorney for said defendants Rosario Gambino and Joseph Lima, it is hereby—

Ordered, That the May, 1925, term of this court be ex-

tended thirty days from the date hereof for the purpose of signing and settling the bill of exceptions to be signed and settled and filed herein, and for all other purposes; and it is further—

Ordered, That the United States of America, complainant herein, be granted an extension of time to be and appear at the United States Circuit Court of Appeals for the Second Circuit at the City of New York, N. Y., of thirty days from the date hereof.

Frank Cooper, United States District Judge.

In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

[fol. 85] Stipulation re Extension of Time—September 16, 1925

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the time within which to docket the above case and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Second Circuit, and for the United States Court Clerk of this District, to make return to the citation herein, be further extended to and including the 30th day of December, 1925, and the attorneys for the respective parties hereto hereby waive notice of application for such extension, required by Rule 14 of the Rules of Practice of the said United States Circuit Court of Appeals, Second Circuit, and hereby consent to the making and entry of an order herein granting the extension aforesaid for the purposes mentioned.

Dated September 16th, 1925.

I. K. Baxter, Attorney for Plaintiff-in-Error. Leo Bresel, Attorney for Defendant-in-Error and Assistant United States Attorney.

[fol. 86] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Order Extending Time—September 16, 1925

This matter coming on further to be heard before the Honorable Frank Cooper, United States District Court Judge, in and for the Northern District of New York, and upon the stipulation of the attorneys for the respective parties in the above entitled action dated September 16th, 1925, and due deliberation having been had thereon, it is hereby

Ordered, That the May, 1925, term of this court be further extended to and including the 30th day of December, 1925; and the time to docket the above case and file the record thereof with the clerk of the United States Circuit Court of Appeals, Second Circuit, and for the clerk of the United States District Court, to make return to the citation [fol. 87] herein, be and the same hereby is extended to and including the 30th day of December, 1925.

Dated September 16th, 1925.

Frank Cooper, United States District Judge, Northern District of New York.

In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Stipulation re Extension of Time—December 29, 1925

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the time within which to docket the above case and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Second Circuit, and for the United States Court Clerk of this District, to make return to the [fol. 88] citation herein, be further extended to and includ-

ing the 1st day of August, 1926, and the attorneys for the respective parties hereto hereby waive notice of the application for such extension required by Rule 14 of the Rules of Practice of the said United States Circuit Court of Appeals, Second Circuit, and hereby consent to the making and entry of an order herein granting the extension aforesaid for the purposes mentioned.

I. K. Baxter, Attorney for Plaintiff-in-Error. Leo Breed, Assistant United States Attorney and Attorney for Defendant-in-Error.

In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Order Extending Time—December 29, 1925

[fol. 89] This matter coming on further to be heard before the Honorable Frank Cooper, United States District Court Judge, in and for the Northern District of New York, and upon the stipulation of the attorneys for the respective parties in the above entitled action, dated December 29, 1925, and due deliberation having been had thereon, it is hereby

Ordered, That the May, 1925, term of this Court be further extended to and including the 1st day of August, 1926; and the time to docket the above case and file the record thereof with the Clerk of the United States Circuit Court of Appeals, Second Circuit, and for the Clerk of the United States District Court, to make return to the citation herein, be and the same hereby is extended to and including the 1st day of August, 1926.

Frank Cooper, United States District Judge, Northern District of New York.

[fol. 90] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated between the parties that the foregoing record is the record on writ of error herein and further comparison by the Clerk be dispensed with.

Dated July 14th, 1926.

Irving K. Baxter, Attorney for Plaintiff-in-Error.
Oliver D. Burden, United States Attorney and Attorney for Defendant-in-Error.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 91] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

ROSARIO GAMBINO and JOSEPH LIMA, Plaintiffs in Error,

v.

UNITED STATES, Defendant in Error

Before Martin T. Manton and Learned Hand, Circuit Judges, and Augustus N. Hand, District Judge

OPINION—Filed January 21, 1927

PER CURIAM:

Judgment of conviction affirmed.

[fol. 92] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Error to the District Court of the United States for the Northern District of New York

Decree—Filed January 28, 1927

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[fol. 93] [File endorsement omitted.]

[fol. 94] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 95] Supreme Court of the United States

Order Allowing Certiorari—Filed May 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.